Supreme Court, U.S.
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No. 01-1836

IN THE

Supreme Court of the United States

JOHNNY E. WALKER,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF C RTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Provident Life & Accident Insurance Company, is a wholly owned subsidiary of UNUMProvident Corporation, which is a publicly traded corporation on the New York Stock Exchange.

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COUNTERSTATEMENT OF THE CASE

Petitioner initially brought an ERISA plan enforcement action pursuant to 29 U.S.C. § 1132, alleging that Provident Life & Accident Insurance Company ("Provident") failed to pay disability benefits allegedly due him under the Southern Company Long Term Disability Plan. On December 20, 2000, Walker filed a motion for leave to amend his complaint to add a claim under Alabama law alleging bad faith refusal to pay his claim and seeking extracontractual damages therefor. Walker's motion to amend relied on the decision of the district court in *Hill v. Blue Cross Blue Shield of Ala.*, 117 F. Supp. 2d 1209 (N.D. Ala. 2000) (Acker, J.). Provident strongly opposed Walker's motion, on grounds that (1) an Alabama State law bad faith claim is not saved from preemption by the "saving clause;" and (2) a state law bad faith claim is preempted because it conflicts with ERISA's exclusive statutory enforcement mechanism.

The district court granted Walker's motion to amend the complaint, reaffirming its previous decision in *Hill*, and, later, amended its order to permit Provident to file a petition for interlocutory review under 28 U.S.C. § 1292(b). Provident did so on March 8, 2001. On April 20, 2001, the Eleventh Circuit Court of Appeals granted Provident's petition. On April 30, 2001, the district court stayed all proceedings in the trial court pending adjudication of this appeal. On January 23, 2002, the Eleventh Circuit reversed the district court, holding that the Alabama tort of bad faith does not "regulate insurance" under the ERISA saving clause analysis and is, therefore, not saved from preemption.

Walker v. Provident Life & Accident Ins. Co., 279 F.3d 1289, 1293 (11th Cir. 2002).[1]

The Eleventh Circuit denied Petitioner's Petition for Rehearing on March 15, 2002 and issued its judgment as a mandate on March 26, 2002.

SUMMARY OF ARGUMENT

After the filing of the petition in this case, this Court issued its decision in *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, No. 00-1021, 2002 U.S. LEXIS 4644 (June 20, 2002). That decision removes any sliver of doubt that Petitioner's state law bad faith claim is preempted and overturns recent speculation in a small minority of district courts that a state law bad faith cause of action can survive ERISA preemption. In *Moran*, this Court confirmed its prior holding in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 481 (1987), that ERISA preempts a state law that provides a remedy that supplements or supplants the exclusive remedies of ERISA, regardless of whether the state law "regulates insurance" under the saving clause analysis. Furthermore, subsequent to *Moran*, this Court has recently denied the Petition for Writ of Certiorari in *Patrick v. UNUM Life Ins. Co. of Am.*, No. 01-764, 2002 U.S. LEXIS 4695 (June 24, 2002), in which the plaintiff asserted that a California bad faith claim arising from the denial of ERISA plan benefits was saved from preemption under ERISA.

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1. As noted by Petitioner, although the Eleventh Circuit opinion identifies UNUMProvident Corp. and Southern Co. Servs., Inc. as Defendants, those two parties were dismissed from the underlying case on September 26, 2000 and November 16, 2000, respectively, and are not involved in this petition.

Petitioner's argument that this Court should allow the Alabama bad faith claim as a remedy that "supplements" the ERISA remedies under § 502(a) is directly contrary to both the majority opinion and the dissent in *Moran* and to this Court's previous decisions, including *Pilot Life*. Moreover, the opinions from the Second and Third Circuit cited by the Petitioner in his pre-*Moran* brief do not establish any split among the circuits as to ERISA's preemption of state law causes of action which conflict with the exclusivity of ERISA's remedial scheme. Petitioner's arguments on this point amount to unsupported policy arguments for a change in the law, which are appropriately directed toward Congress and not toward this Court.

Moreover, Petitioner's argument for allowing the "supplementation" of ERISA remedies by a state law bad faith cause of action assumes the false premise that the Alabama tort of bad faith is a "law . . . which regulates insurance" within the meaning of the ERISA saving clause. The court below did not even reach the issue of whether Alabama's bad faith cause of action conflicts with the exclusivity of ERISA's remedies because it found that Alabama's bad faith cause of action is not a "law . . . which regulates insurance" within the meaning of the ERISA saving clause. The court of appeals in the case below confirmed prior Eleventh Circuit precedent holding that the Alabama tort of bad faith is no different than the Mississippi bad faith claim in *Pilot Life*, which this Court held was not within ERISA's insurance saving clause. Thus, even if the Petitioner's state law claim was not in conflict with the exclusivity of ERISA's remedies, which it is, it would be preempted under ERISA's express preemption provision.

The Eleventh Circuit specifically rejected Petitioner's argument that this Court's decision in *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999) altered prior decisions from this Court and the Eleventh Circuit applying the saving clause analysis. *Walker*, 279 F.3d at 1292-93. Petitioner has not cited any post-*Ward* court of appeals decisions or decisions from the highest court of any state that conflict with that holding. Indeed, every circuit court decision since *Ward* has held that state bad faith claims do not "regulate insurance" under ERISA and/or are preempted because they conflict with the exclusivity of ERISA's civil enforcement scheme. *See Howard v. Coventry Health Care of Iowa, Inc.*, No. 01-3067, 2002 U.S. App. LEXIS 11092 (8th Cir. June 7, 2002) (Iowa bad faith claim does not "regulate insurance" so as to be saved from preemption under ERISA); *Moffett v. Haliburton Energy Servs.*, 291 F.3d 1227 (10th Cir. 2002) (Wyoming bad faith cause of action is not saved from preemption and conflicts with the exclusivity of ERISA's remedial scheme); *Hotz v. Blue Cross & Blue Shield of Mass.*, 292 F.3d 57 (1st Cir. 2002) (state unfair claims settlement action is not saved from preemption and conflicts with ERISA's remedies); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001) (Alabama bad faith claim is not a law that "regulates insurance" and conflicts with ERISA's exclusive remedies). The only state supreme court to address the issue to date holds that a state bad faith claim is not saved from preemption under ERISA. *Midwest Sec. Life Ins. Co. v. Stroup*, 730 N.E.2d 163 (Ind. 2000). Thus, the lower courts are completely consistent with this Court's precedent in rejecting arguments like those made by Petitioner.

Petitioner's argument is nothing more than a request that this Court overturn a body of law that was reaffirmed as recently as June 2002 in *Moran*.

REASONS FOR DENYING THE WRIT

I. *Moran* Confirms Prior Precedent Of This Court Regarding ERISA Preemption.

This Court's decision in *Moran* confirms that ERISA preempts any state law that purports to provide a remedy that either supplements or supplants the exclusive remedies of ERISA, regardless of whether the state law "regulates insurance." This Court held that the state law in *Moran* was not a state remedial law and therefore did not conflict with the exclusivity of ERISA's remedies. In doing so, this Court reaffirmed that ERISA's remedies are exclusive and that any state law that does purport to provide a remedy arising out of the processing of a claim for ERISA plan benefits, as does the Alabama bad faith claim in this case, is preempted.

A. ERISA Implicates Two Different Modes of Preemption.

As recognized in *Moran*, ERISA implicates two different modes of preemption analysis: "express preemption" and "conflict preemption."

First, in accordance with the plain language of ERISA § 514 [29 U.S.C. § 1144], ERISA expressly preempts all state civil laws that "relate to" employee benefit plans save those state laws that regulate insurance, banking, or securities.[2]

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2. "Except as provided in subsection(b) of this section, the provisions of this title . . . shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). "[N]othing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A).

This is ERISA's "express preemption" provision under which state laws need not be in actual conflict with ERISA in order to be preempted. Rather, even state laws that are fully consistent with provisions of ERISA are preempted by § 514 unless they fall within the saving clause applicable to state insurance, banking, or securities regulations. *See, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829-30 (1988); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

Second, a finding that a state law is a "law . . . which regulates insurance" within the meaning of ERISA § 514(b)(2)(A) does not mean that the law necessarily can be applied in the context of an ERISA plan. Rather, ERISA also preempts state laws to the extent that they "conflict[ ] with the provisions of ERISA or operate[ ] to frustrate its objects." *Boggs v. Boggs*, 520 U.S. 833, 841 (1997); s*ee also Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001) (state statute that mandates the beneficiary of certain employee benefits on the death of the participant is preempted where it "directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents"). This "conflict preemption" applies even to state laws, such as insurance regulatory laws, that would otherwise be saved from preemption under the express preemption provisions of ERISA § 514. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993) ("State law governing insurance generally is not displaced, but 'where [that] law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs").[3]

3. The notion that even an express saving clause does not save state laws that fail a "conflict preemption" analysis is not a notion that is peculiar to ERISA. Most recently, in *Geier v. Am. Honda Motor* (Cont'd)

B. *Pilot Life* Found That Mississippi's Tort of Bad Faith is Preempted Under Each Type of Preemption Analysis.

The unanimous decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), applied both express and conflict preemption principles under ERISA to hold that a state law bad faith claim is preempted. The plaintiff was a beneficiary under an employee benefit plan insured by *Pilot Life*. The issue before the Court was whether ERISA "pre-empts state common law tort and contract actions asserting improper processing of a claim for benefits under an insured employee benefit plan." *Pilot Life Ins. Co.*, 481 U.S. at 43. The plaintiff argued that ERISA does not preempt a cause of action under Mississippi's law of bad faith because that law is a state law which regulates insurance and is thus saved from preemption under ERISA's "express preemption" clause, § 514(b).

The Court rejected the plaintiff's argument for two reasons. First, as explained in subpart I.B(1), below, the Mississippi bad faith claim is preempted under "express" preemption principles because it does not "regulate insurance" and is not "saved" from preemption. Second, as explained next in subpart I.B(2), the state law claim is also preempted under "conflict" preemption principles, even assuming arguendo that the state law claim

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(Cont'd)

Co., 529 U.S. 861, 870, 886 (2000), the Supreme Court held that the saving clause of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, *et seq.* (1988 ed.) did not save from conflict preemption a state common law tort action. Noted the Court, "this Court has repeatedly 'declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.' " 529 U.S. at 870 (quoting *United States v. Locke*, 529 U.S. 89, __ (2000)).

"regulate[s] insurance," because the state law purports to supplement ERISA's civil enforcement scheme, which the Court held is the exclusive means of remedying claims of improper processing of plan benefits.

1. Mississippi's bad faith law is expressly preempted because it is not a law which regulates insurance.

First, the Court determined that Mississippi's bad faith law, while certainly "identified with the insurance industry," is not a "law . . . which regulates insurance" within the meaning of § 514(b). To reach this conclusion, the *Pilot Life* Court applied the two-part test announced in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) for determining whether a particular state law is a law that regulates insurance under ERISA § 514. Under this two-part test, courts first examine whether the challenged law regulates insurance from "a common-sense view of the matter." *Metropolitan Life*, 471 U.S. at 741. Courts then consider the three factors used to identify the "business of insurance" under the McCarran-Ferguson Act:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 743 (emphasis preserved).

Applying first the common sense test, the Court in *Pilot Life* found that the Mississippi law of bad faith does not regulate insurance from a common sense view because, "[e]ven

though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law." *Pilot Life Ins. Co.*, 481 U.S. at 50.

Turning to the second part of the test, the Court held that an analysis of the three McCarran-Ferguson factors reinforces the conclusion that the bad faith cause of action is not a law that regulates insurance.

> Unlike the mandated-benefits law at issue in *Metropolitan Life*, the Mississippi common law of bad faith does not effect a spreading of policyholder risk. The state common law of bad faith may be said to concern "the policy relationship between the insurer and the insured." The connection to the insurer-insured relationship is attenuated at best, however. In contrast to the mandated-benefits law in *Metropolitan Life*, the common law of bad faith does not define the terms of the relationship between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive damages. The state common law of bad faith is therefore no more "integral" to the insurer-insured relationship than any State's general contract law is integral to a contract made in that State. Finally, as we have just noted, Mississippi's law of bad faith, even if associated with the insurance industry, has developed from general principles of tort and contract law available in any Mississippi breach of contract case. Accordingly,

> the Mississippi common law of bad faith at most meets one of the three criteria used to identify the "business of insurance" under the McCarran-Ferguson Act, and used in *Metropolitan Life* to identify laws that "regulate insurance" under the saving clause.

Id. at 50-51 (citations omitted).

Thus, the Mississippi bad faith claim is not a "law . . . which regulates insurance" within the meaning of the ERISA saving clause and is therefore not saved from express preemption under that section.

2. More importantly, Mississippi's bad faith law is also preempted because it conflicts with Congress's intent that ERISA's remedies be exclusive.

Second, and "most importantly," *id.* at 57, the Court in *Pilot Life* determined that allowing ERISA beneficiaries to bring varying state causes of action for claims that are within the scope of ERISA's civil enforcement provision "would pose an obstacle to the purposes and objectives of Congress." *Pilot Life Ins. Co.*, 481 U.S. at 52. ERISA contains a civil enforcement provision that includes a panoply of remedies for ERISA plan participants, beneficiaries, and fiduciaries. *See* ERISA § 502(a) [29 U.S.C. § 1132(a)]. The civil enforcement scheme of ERISA "is one of the essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co.*, 481 U.S. at 52. Examining the language and structure of ERISA's civil enforcement provision, and reviewing the legislative history of that provision, the Court concluded "that ERISA's civil enforcement remedies were

intended to be exclusive." *Id.* at 54. Congress's aim was to advance "the public purpose in encouraging the formation of employee benefit plans." *Id.* at 54. A "carefully balanced" and nationally "uniform" remedial scheme would protect the basic rights of beneficiaries while at the same time minimizing the costs of the plans so as not to deter their creation. The Court therefore expressly endorsed the Solicitor General's position that Congress intended "the civil enforcement provisions of ERISA § 502(a) [to] be the exclusive vehicle for actions by ERISA plan participants and beneficiaries asserting improper processing of a claim for benefits." *Id.* at 52.

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly' . . . The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue

> strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

Id. at 54.

Rejecting any suggestion that the saving clause might rescue a state law cause of action from preemption, the Court found that the saving clause itself need be construed so as to implement Congress's intent that ERISA beneficiaries pursue exclusively ERISA remedies. *Id.* at 52 ("our understanding of the saving clause must be informed by the legislative intent concerning the civil enforcement provisions provided by ERISA § 502(a)"); *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. at 870 (The Supreme Court will regularly "decline[]to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.").

C. Supreme Court Case Law Leading up to *Moran* Confirms the Role of Conflict Preemption Under ERISA.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), further focused the Court's emphasis upon the exclusivity of ERISA's civil enforcement provision, § 502, as a source of "conflict preemption" supplementary to ERISA's "express preemption" language in § 514. After finding a Texas common law cause of action preempted under § 514 because it relates to ERISA plans, the Court emphasized the independently preemptive effect of § 502, stating:

> Even if there were no express pre-emption in this case, the Texas cause of action would be pre-

> empted because it conflicts directly with an ERISA cause of action.

Id. at 142.

The principle that ERISA preempts even a state insurance regulatory law if it conflicts with congressional intent pertaining to specific aspects or provisions of ERISA was relied upon yet again in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993). There, the Court found that ERISA preempts a state law that admittedly regulates insurance, and thus otherwise is saved from "express preemption" under § 514, because it conflicts with one of ERISA's purposes. *John Hancock Mut. Life Ins. Co.*, 510 U.S. at 99 (When state insurance regulation "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, federal preemption occurs.").

This Court's decision in *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999) does not alter any of this law. True, the new Solicitor General as *amicus* did seek to "modify" the position of his predecessor by contending that if a state law remedy was a law that regulates insurance, it might not be preempted notwithstanding the exclusivity of ERISA § 502(a). *Ward*, 526 U.S. at 376 n.7. The Supreme Court nevertheless found no need to address this attempted revisionism by the Solicitor General because the plaintiff in *Ward* sought only to maintain a claim under ERISA § 502(a). *Id.; see also Moran*, 2002 U.S. LEXIS 4644, at *43-44 (distinguishing *Ward* from *Pilot Life* because *Ward* did not involve an additional claim or remedy outside of ERISA).

Subsequently, the current Solicitor General has recanted the position taken by his predecessor in *Ward*, returning to

the United States' initial position that was, after all, approved by the Supreme Court in *Pilot Life*. In the words of the Solicitor General:

> After noting that causes of action outside Section 502(a) would lead to the award of judicial remedies, such as compensatory and punitive damages, that Congress had rejected, . . . the Court [in *Pilot Life*] concluded that "the policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA," . . . *That reasoning clearly prevents a State from adopting causes of action under state law to enforce the terms of an ERISA plan (including any incorporated provisions of state law) as an alternative to the cause of action under federal law in Section 502(a)(1)(B). For the same reasons, a State could not under any circumstances make a plan or its insurer liable to the participant or beneficiary for punitive damages*. Such a requirement would be far removed from what private parties might ordinarily contract for and would directly upset the policy choices reflected in Congress' inclusion of certain remedies and the exclusion of others.

Brief for the United States as amicus curiae in *Rush Prudential HMO, Inc. v. Moran*, No. 00-1021, 2000 U.S. Briefs 1021 (LEXIS), at Part III(B)(1)(f) (emphasis added).

This Court essentially adopted the Solicitor General's position in *Moran*.

II. *Moran* Confirms That ERISA's Remedies Cannot Be Supplemented By State Law Remedies, Even State Laws That Arguably Regulate Insurance, Because ERISA's Remedies Are Intended To Be Exclusive.

The state law at issue in *Moran* was a state third-party review law. The initial issue addressed by the Court was whether that law "regulate[d] insurance." The Court held that it did "regulate insurance" and that it fell within ERISA's insurance saving clause. The Court then moved on to the next issue, which was whether the state law was a remedial law that would, by definition, conflict with ERISA's civil enforcement provisions. If the fact that the state law was subject to the saving clause was sufficient to remove the law from preemption, as Petitioner suggests in this case, there would have been no need for the Court to address the second issue, i.e., whether the state law in *Moran* was a remedial law that would be preempted because of the exclusivity of ERISA's civil enforcement scheme.

The foundation for the Court's decision in *Moran* was the "overpowering federal policy" of exclusivity under ERISA. *Moran*, 2002 U.S. LEXIS 4644, at *37. The Court explained that ERISA preempts any state law cause of action or remedy that was not authorized by Congress pursuant to 28 U.S.C. § 1132(a). *Id.* at *37-39. Citing this Court's earlier decisions, *Moran* explained that, regardless of whether state law "regulates insurance," if the state law purports to provide a remedy that supplements or supplants the exclusive

remedies of ERISA, it is preempted.[4] *Id.* at *38-39. The Court explained that where there is a "forced choice between the congressional policies of exclusively federal remedies and the 'reservation of the business of insurance to the States,' . . . we have anticipated such a conflict, with the state insurance regulation losing out if it allows plan participants 'to obtain remedies . . . that Congress rejected in ERISA.' " *Id.* at *38 (citing *Pilot Life Ins. Co.*, 481 U.S. at 54). The Court recognized that, under *Pilot Life*, ERISA would not allow a state law cause of action for breach generally or for damages not expressly authorized by § 1132(a). *Id.*

After laying the foundation that ERISA's remedies are exclusive, the Court concluded that the state law at issue in *Moran* did not involve the sort of additional claim or remedy that would conflict with ERISA like the bad faith claim in *Pilot Life*. However, the bad faith claim in this case is virtually identical to the claim in *Pilot Life*. It is undisputed that Petitioner's state law claim is an attempt to supplement the exclusive remedies of ERISA. Thus, unlike the state procedural law at issue in *Moran*, the state remedial law at issue in this case is preempted, whether or not it also "regulates insurance."

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4. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co.*, 481 U.S. 41; *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

III. The Eleventh Circuit Court Of Appeals In The Case Below Found That The Alabama Tort Of Bad Faith Is Not Saved From Preemption By The Saving Clause Because It Does Not "Regulate Insurance."

In the present case, the court below did not reach the conflict preemption issue because it held that the Alabama tort of bad faith is not a "law . . . which regulates insurance" within the language of the saving clause. The Eleventh Circuit held that this Court's decision in *Ward* does not alter the saving clause analysis applied in *Pilot Life* and does not create a new standard for analyzing ERISA's saving clause. *Walker*, 279 F.3d at 1292-93.

The court of appeals applied the *Metropolitan Life* standard applied by this Court in *Pilot Life*. The Eleventh Circuit concluded that the Alabama tort of bad faith fails to satisfy the common sense test because, like the Mississippi bad faith law in *Pilot Life*, the Alabama law of bad faith is rooted in the common law of contracts and torts. *Id.* at 1293.

The court then applied the McCarran-Ferguson factors to determine whether the Alabama tort of bad faith regulates the "business of insurance." Citing prior Eleventh Circuit precedent and *Pilot Life*, the Eleventh Circuit held that the tort did not satisfy the first inquiry, whether the law spreads or transfers the policyholder's risk, noting that the Petitioner did not even offer an argument on that point to the Eleventh Circuit. *Id.* at 1293. Similarly, the court held that the tort of bad faith was not an integral part of the policy relationship between the insurer and the insured. *Id.* The court reasoned that the tort of bad faith does not change any contract term because the obligation of good faith is applied in every contract under Alabama law. *Id.* (citing *Ala. Code* § 7-1-203).

Citing *Pilot Life*, the court concluded that the effect of the law of bad faith is not on the terms of the contract, but on the nature of the remedy since the tort allows the plaintiff to recover punitive damages. *Id.* (citing *Pilot Life*, 481 U.S. at 51). Finally, the court explained that the Alabama tort of bad faith does not satisfy the third inquiry under McCarran-Ferguson as to whether the law applies only within the insurance industry. While recognizing that the law was only applicable to insurance cases, the court explained that Alabama bad faith law is a product of basic common law principles which may be summoned in any breach of contract case. *Id.*

Based on that analysis, the Eleventh Circuit reasoned that, like the Mississippi bad faith law addressed in *Pilot Life*, the Alabama tort of bad faith does not fit within the saving clause language and is, therefore, preempted by ERISA. *Id.* at 1293-94.

IV. Petitioner's Petition Is Based On The Faulty Premise That The Alabama Tort Of Bad Faith Is A "Law . . . Which Regulates Insurance" Within The Meaning Of The ERISA Saving Clause.

Petitioner continues to argue that the Alabama tort of bad faith is a "law . . . which regulates insurance" within the meaning of the ERISA saving clause. As explained above, the court below did not even reach the conflict preemption issue because it found, as it had in numerous previous decisions, that the Alabama tort of bad faith is not a "law . . . which regulates insurance." *Walker*, 279 F.3d at 1294; *see also Gilbert*, 276 F.3d 1292 (*Ward* does not alter *Pilot Life* or binding Eleventh Circuit precedent finding that the Alabama tort of bad faith is not a "law . . . which regulates insurance"); *Butero v. Royal Maccabees Life Ins. Co.*, 174

F.3d 1207, 1211-13 (11th Cir. 1999) (holding that claims for bad faith refusal to pay under Alabama law are completely pre-empted by ERISA); *Engelhardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346, 1354 n.11 (11th Cir. 1998) ("[T]he prayer for punitive damages does not take Engelhardt's claim out of the scope of § 1132(a). If it did, any plaintiff could thwart Congress's intent to completely preempt claims arising out of the denial of ERISA benefits by artful pleading."); *Mullenix v. Aetna Life & Cas. Ins. Co.*, 912 F.2d 1406, 1411-12 (11th Cir. 1990) (citing *Belasco* for the proposition that the saving clause does not apply to claims against the insurer for medical and surgical benefits and for bad faith and fraud, because the Alabama low of bad faith has roots in general principles of tort and contract law and is not "related to" the insurance industry); *Amos v. Blue Cross-Blue Shield of Ala.*, 868 F.2d 430, 431 (11th Cir. 1989) (claim for relief under Alabama bad faith law is completely displaced by ERISA § 502(a)); *Belasco v. W.K.P. Wilson & Sons, Inc.* 833 F.2d 277, 281 (11th Cir. 1987) ("[T]he Alabama law of bad faith appears to us to have the same roots 'in the general principles of . . . tort and contract law' as was the case in *Dedeaux* [v. *Pilot Life*].").

As recognized by the court below and in *Gilbert*, the *Ward* opinion does nothing to change the application of *Pilot Life* to the Alabama tort of bad faith. *Ward* simply applied the saving clause analysis to the California notice prejudice rule — a rule completely different from the bad faith claim addressed in *Pilot Life*.

Petitioner asserts that there is a conflict among the circuits that justifies granting the petition, but does not cite any court of appeals' decision finding that a state law bad faith claim is "a law . . . which regulates insurance" under

the saving clause analysis. In fact, while Petitioner argues that the Alabama tort of bad faith regulates insurance because it is allegedly codified within the "insurance" title of the Code,[5] Petitioner does not explain how the analysis of the saving clause issue in the court below is incorrect. Furthermore, neither of the two court of appeals cases that Petitioner cites — *PAS v. Travelers Ins. Co.*, 7 F.3d 349 (3d Cir. 1993) and *Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144 (2d Cir. 1995) — addresses laws analogous to the Alabama tort of bad faith. *PAS* involved a statute that specifically prohibited discrimination in insurance policies, and *Franklin H. Williams Ins. Trust* involved a New York statute relating to the payment of interest on insurance proceeds. In fact, both of these cases applied the same saving clause analysis applied in *Pilot Life*, but reached a different conclusion specific to the statutes at issue in those cases. Those cases are pre-*Ward* and certainly do not hold that *Ward*

5. Petitioner's claim that the Alabama tort of bad faith is codified in Alabama Code § 27-12-24 is incorrect. First, it is logically impossible for Alabama Code § 27-12-24 to be a codification of an existing Alabama common law tort of bad faith. Alabama Code § 27-12-24 was passed by the legislature in 1971, ten years before Alabama recognized cause of action for bad faith and has not been amended since that time. *See Ala. Code* § 27-12-24 (1998); *Chavers v. Nat'l Sec. Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981). Additionally, the Alabama Supreme Court decisions establishing the tort of bad faith do not reference Ala. Code § 27-12-24 in any way, but instead base the tort of bad faith on general principles of tort and contract law. Moreover, the Alabama Supreme Court has repeatedly held that there is no private right of action for violation of the Alabama Insurance Code and more specifically for a violation of the Alabama Insurance Trade Practices Act, which contains Ala. Code § 27-12-24. *American Auto. Ins. Co., v. McDonald*, 812 So. 2d 309, 311-12 (Ala. 2001) (no private right of action for violation of the Alabama Insurance Code). Finally the elements of the tort are quite different from the language of the text of Ala. Code § 27-12-24.

altered the saving clause analysis in any way. No court of appeals has held that *Ward* altered the saving clause analysis. Accordingly, there is simply no split among the circuits as to the application of the saving clause analysis to state law bad faith causes of action or the impact, or lack thereof, of *Ward* on that analysis.

In sum, Petitioner has failed to establish any basis for this Court to conclude that the Eleventh Circuit's holding that the Alabama tort of bad faith is not "a law . . . which regulates insurance" should be reviewed by this Court. There is no conflict with the decisions of another court of appeals, and there is no basis for the exercise of this Court's supervisory power. Moreover, this case does not present an important federal issue that has not been decided by this Court or that has been decided in a way that conflicts with relevant decisions of this Court. *See* S. Ct. R. 10.

V. Regardless Of Whether The Alabama Tort Of Bad Faith Is A "Law . . . Which Regulates Insurance," It Is Pre-Empted By The Exclusivity Of ERISA's Remedial Scheme.

Petitioner's argument that Alabama bad faith claims "regulate insurance" is not only wrong, it is irrelevant to the question of ERISA preemption. This Court's consistent precedent, from *Russell*, through *Taylor* and *Pilot Life*, *Ingersoll-Rand*, and *John Hancock*, and most recently, *Moran*, holds that ERISA's remedies are exclusive and that they may not be supplemented by state law causes of action. Petitioner's theory that *Ward* somehow modified this precedent is not only rebutted by *Moran* but also by consistent authority in the courts of appeals and in the one state supreme court to address the issue since *Ward*. *Howard v. Coventry*

Health Care, supra; *Moffett v. Haliburton Energy, supra; Hotz v. Blue Cross, supra*; *Gilbert v. Alta Health & Life Ins. Co., supra*; *Midwest Sec. Life Ins. v. Stroup, supra.* The Eleventh Circuit's decision below is consistent with all of these cases. There is no reason for this Court to re-address an issue that it has definitively decided on multiple occasions.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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